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No. 73-487

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In the Supreme Court of the United States

OCTOBER TERM, 1973

HOUSTON NATURAL GAS CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-B—5-B) is reported at 478 F. 2d 467. The decision and order of the National Labor Relations Board (Pet. App. 1-C—10-C) are reported at 198 NLRB No. 35; its decision in the related representation case (Pet. App. 1-D—7-D) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 11, 1973, and the Company's petition for rehearing was denied on July 13, 1973 (Pet. App. 1-A—2-A). The petition for a writ of certiorari was filed on September 14, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board properly refused to set aside a representation election because of the pro-union activities of an alleged supervisor.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at Pet. 2-3.

STATEMENT

On July 26, 1971, the International Union of Operating Engineers, Local 347, AFL-CIO, filed a representation petition with the Board seeking certification as the bargaining representative of all maintenance employees, operators, and apprentices and trainees employed by the Houston Natural Gas Corporation at its plant in Houston, Texas (A. 109-111).[1] The Company contended that the bargaining unit sought was inappropriate because it included lead operator Nathan Kitchens and operators "A" who, the Company alleged, were supervisors within the meaning of Section 2(11) of the Act (Pet. App. 3-D, n. 10).[2] The Company also contended that the

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[1] "A." refers to the printed appendix to the briefs in the court below.

[2] The Company, a public utility, employed 10 employees in the following work classifications: lead operator, operators A, operators B, operators C, and apprentices (Pet. App. 3-D, n. 10; A. 159). The lead operator and operators A perform identical functions and the classifications are used interchangeably (A. 120, 146, 154-155, 232). They are in charge of each shift and are responsible for maintaining the plant's operation during that shift (Pet. App. 4-D; A. 120, 122, 215). Their duties include monitoring controls, determining whether additional equipment should be placed in, or removed from, operation, to maintain the proper heating or cooling levels, and instructing other members of the shift when

Union's showing of employee interest supporting its petition[3] was invalid because it was secured through the efforts of lead operator Kitchens (Pet. App. 2-D, n.9).

Following a hearing, the Regional Director found that operators A were highly skilled employees rather than supervisors and thus properly included in the requested bargaining unit (Pet. App. 5-D). He also found that the record was not sufficiently detailed to determine whether lead operator Kitchens was a supervisor, but permitted Kitchens to vote in the election subject to challenge (*ibid.*). Finally, the Director found that, even if Kitchens were a supervisor, his activities on behalf of the Union did not taint the Union's showing of employee interest and thus require dismissal of its petition (Pet. App. 2-D—3-D, n. 9; A. 14).[4] The

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to start, stop, and operate the machinery (A. 120-121, 186, 209). Lead operators and operators A have no authority to hire or fire employees (Pet. App. 3-D, n. 10; A. 138-142, 162-163, 167-168). Nor do they have effective authority to promote employees (Pet. App. 3-D, n. 10; A. 124-126, 149-150, 181-182). Similarly, lead operators and operators A play no effective role in determining salary increases, which are granted by a compensation committee pursuant to a schedule; they are based on time worked for the Company and Operating Manager Amann's recommendations regarding the employee's performance (A. 177-181, 227). Lead operators and operators A also have no authority to discipline employees (A. 143-144, 227). All disciplinary action is initiated by the chief operator and then referred to Amann for final action (A. 144, 160). Lead operators and operators A are required to consult with the chief operator if they have problems at the plant (Pet. App. 4-D; A. 173, 205-208).

[3]The Board normally requires that a petition be supported by authorization cards signed by at least 30 percent of the employees in the bargaining unit.

[4]The Director's investigation revealed that, while Kitchens attended several Union meetings and signed a letter sent by the employees to the Company indicating that he had authorized the Union to represent him, no evidence was adduced that he solicited

Company's request for review of the Director's decision and direction of election (A. 18) was denied by the Board because it raised no substantial issues warranting review (A. 37). The Union won the ensuing election—held on November 16, 1971—by nine votes to three, with five challenged ballots, including that of Kitchens (A. 54).[5]

Thereafter, the Company filed objections to conduct allegedly affecting the results of the election (A. 38). Specifically, the Company asserted that (1) a Union representative entered the voting area while wearing a Union button; (2) a supervisor known to be a Union supporter voted in the election; and (3) a supervisor known to be a Union supporter remained in the immediate vicinity of the polling place campaigning for the Union (A. 38-39).

On November 23, 1971, the Regional Director sent Company counsel a letter advising that pursuant to Board policy the Company, as objecting party, was required to furnish evidence in support of its objections within five working days from the receipt of the letter (A. 41). The letter was received at the office of the Company's counsel on November 24 (A. 42). On December 3, having failed to receive any response from the Company, the Regional Director issued a supplemental

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employees to sign authorization cards. Although Kitchens told employees on one occasion that he signed a letter to the employer (A. 234) because it was a "good idea," this incident occurred after the Union's showing of interest had been secured. When Kitchens finally expressed his opinion about the Union, almost all of the employees had signed authorization cards (Pet. App. 2-D, n. 9).

[5]Inasmuch as the challenged ballots were insufficient to affect the election results, it was unnecessary to resolve the question whether Kitchens was a supervisor.

decision, overruling the Company's objections in their entirety and certifying the Union as bargaining representative of the unit (A. 44, 45). The Board denied the Company's request for review of the Director's action (A. 53).

Thereafter, the Company refused to bargain with the Union, and an unfair labor practice complaint issued alleging that the Company had violated Section 8(a)(5) and (1) of the Act (Pet. App. 1-C). The Board, finding that there were no issues that had not been decided in the representation proceeding, granted the General Counsel's motion for summary judgment (Pet. App. 4-C).[6] The Board ordered the Company, *inter alia,* to bargain with the Union upon request (Pet. App. 9-C).

The court of appeals upheld the Board's decision and enforced its order (Pet. App. 5-B).

ARGUMENT

Petitioner does not dispute here the Board's finding, sustained by the court below, that operators A are employees and thus properly included in the bargaining unit. It maintains only that the election process was tainted by the participation of lead operator Kitchens, whom it alleges to be a supervisor. Insofar as this

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[6] Approximately 2-1/2 months after filing its opposition to the General Counsel's motion for summary judgment, the Company filed a supplemental opposition and accompanying affidavits stating that it is "now possessed of substantial relevant evidence" which would require a dismissal of the complaint (A. 93). The Board granted the General Counsel's motion to strike the supplemental opposition on the grounds that there was no showing that the proffered evidence could not have been produced in the underlying representation proceeding, or that special circumstances existed warranting reexamination of the Board's determination in the representation proceeding (Pet. App. 4-C, n. 5).

contention is based on Kitchens' activities in aiding the Union in securing a showing of interest to support its representation petition, the Board properly rejected that contention for the reasons set forth in n. 4, *supra*. Insofar as this contention rests upon Kitchens' activities during the election itself, the contention is foreclosed by the fact that petitioner failed to supply evidence in support of its allegations in timely fashion. As the court below noted (Pet. App. 4-B): "Counsel presented no adequate reason why he or at least some other attorney in his office did not respond within the time limit, so we believe the Board's disposition of the case was justified in order to effectuate the implicit congressional purpose of expeditiously resolving questions preliminary to the establishment of the bargaining relationship." See *National Labor Relations Board* v. *Huntsville Mfg. Co.*, 203 F. 2d 430, 433-434 (C.A. 5).[7]

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[7] Petitioner's contention that it was entitled to an evidentiary hearing on its objections rests on the premise that it presented material issues of fact. However, since its objections were untimely, that question is not properly presented here. Petitioner's final contention that summary judgment was improperly granted here is likewise without merit. It is well settled that, absent a showing of newly discovered or previously unavailable evidence, matters which were or could have been considered in an underlying representation case may not be relitigated in the related unfair labor practice proceeding. *Pittsburgh Plate Glass Co.* v. *National Labor Relations Board*, 313 U.S. 146, 158, 162; *Magnesium Casting Co.* v. *National Labor Relations Board*, 401 U.S. 137, 141 (overruling *Pepsi-Cola Buffalo Bottling Co.* v. *National Labor Relations Board*, 409 F. 2d 676 (C.A. 2), on which petitioner relies).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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